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IN THE

SUPREME COURT OF THE UNITED STATES

No. 898.

NEW YORK LIFE INSURANCE COMPANY,
a corporation, PETITIONER.

vs.

MARY ANN ATKINSON, RESPONDENT.

RESPONDENT BRIEF AGAINST ISSUANCE OF WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

QUESTION PRESENTED

The question presented before this Honorable Court is well stated by the learned Court of Appeals in its opinion wherein the Chief Judge states:

> "The substance of the ultimate question presented for determination is whether at the time of his death an insured was a member of the crew of an airplane in which he was riding within the purview of a cru-

> cial provision in a policy of life insurance . . . the policy expressly excluded from such provision liability if the death of the insured resulted from 'service, travel or flight in any kind of aircraft . . . while the insured is participating in aviation training in such aircraft, or is a pilot, officer or other member of the crew of such aircraft (Appendix A, appellant's brief, page 7).' "

In determining the factual question presented, the Court then held that the word "crew" in the phraseology "member of the crew" of the aircraft as it appeared in the double indemnity provision of petitioner's policy was ambiguous. After coming to the foregoing conclusion the Court further ruled that an insurance policy is a contract which, if its terms are ambiguous, must be construed against the insuror and in favor of the insured.

REASONS AGAINST ISSUANCE OF THE WRIT

It is the position of respondent that petitioner has failed to show any compelling reason for the issuance of a writ of certiorari by this Honorable Court to the Court of Appeals of the Tenth Circuit. The grounds for the issuance of such a writ are found in Rule 19, Revised Rules of the Supreme Court of the United States, adopted April 12, 1954, effective July 1, 1954. A search of these provisos fails to reveal any in which petitioner can find shelter. Indeed, the only proviso upon which petitioner might possibly rely is "the Court of Appeals has decided an important question of Federal Law which has not been, but should be settled by this Court, or has so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's power of supervision." Pages 17 and 18, Revised Rules of the Supreme Court of the United States.

Respondent submits that neither of the provisos just quoted herein are applicable to the case of petitioner.

It is clear that the petitioner contends that the writ should issue due to the fact that there may be other policies of insurance issued not only by it, but by other companies containing similar clauses and that other possible future claimants may need guidance therefore. Not only is there nothing in the record to support this statement, but also if there were it would be immaterial.

Again, petitioner urges that the writ should issue because "the question is new as far as reported decisions of Federal Courts are concerned. Such State decisions as exist have not been based upon a finding that the word 'crew' is ambiguous." Petitioner's brief, page 4. Respondent submits that although it may be technically correct that the precise factual question has not been heretofore determined, still it is apparent that the principle of law upon which the Court of Appeals based its ruling are well established, not only in Federal Courts, but State Courts as well. There are several decisions in the Federal Courts interpreting aircraft exclusionary provisions, all of which have to do with a determination of whether or not a given decedent or injured party was or was not within the aircraft exclusionary provision of the policy. These decisions lay down the general rule that insurance policies shall be construed against the insuror and in favor of the insured. *Aschenbrenner v. United States Fidelity and Guaranty Company*, 292 U. S. 80, 54 Sup. Ct. 590, 78 L. Ed. 1137 (1934); *Rodenbaugh v. Preferred Accident Insurance Company*, 160 Fed. 2d 832. The rule in State Courts is the same as the rule in the Federal Courts. See *Minor v. Western Casualty and Surety Company*, 241 Iowa 530, 41 NW 2d 557, 14 A. L. R. 2d 1358 (1950);

Charette v. Prudential Insurance Company of America, 202 Wisc. 470, 232 NW 848 (1930); *Funk v. New York Life Insurance Company*, 60 New York Supp. 349, 186 Misc. 449 (1946).

Again, it is submitted by respondent that the Court of Appeals has followed a fundamental rule of legal common sense in holding that the use of the word "crew" or the phrase "member of the crew" in other contexts for other purposes has no bearing upon the use of the word "crew" or the phrase "member of the crew" in connection with its interpretation with respect to its use in an insurance policy held by decedent insured.

It is apparent that the Court of Appeals realized that none of the cases cited by petitioner in its brief were applicable. Said cases are found at page 5 of Petitioner's brief, and are substantially the same as those cited by petitioner before the learned Court of Appeals. None of these cases have anything to do with the issuance of insurance contracts or the rules of construction applicable thereto, but rather, they are examples of the principle of law that the word "crew" does not have an unvarying legal significance but must be interpreted in the light of the context in which it is found. *South Chicago Company v. Bassett*, 309 U. S. 251, 60 Sup. Ct. 544 (1940).

CONCLUSION

It is therefore, respectfully submitted that the decision of the Court of Appeals, having following well established rules of construction in concluding that the word "crew" in the phrase "member of the crew" of the aircraft appearing in the policy of insurance issued by petitioner to the decedent was ambiguous; that no reason for the grant of certiorari exists and that therefore, the petition for the writ should be denied.

Respectfully submitted,

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